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No. 73-698

In the Supreme Court of the United States

OCTOBER TERM, 1973

FRIENDS OF THE EARTH, ET AL., PETITIONERS

v.

GILBERT R. STAMM, COMMISSIONER, BUREAU OF RECLAMATION, AND ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, LIII–LXXX) is reported at 485 F. 2d 1. The opinion of the district court (Pet. App. A, I–LII) is reported at 360 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1973. The petition for a writ of certiorari was filed on October 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

528-938—73——1

QUESTION PRESENTED

Whether Congress, by subsequent statutes, modified or repealed certain provisions of the Colorado River Storage Project Act, so as to permit partial inundation of Rainbow Bridge National Monument by the waters of the Glen Canyon Reservoir.

STATUTES INVOLVED

Section 1 of the Colorado River Storage Project Act of 1956, 70 Stat. 105, 106, 43 U.S.C. 620, provides in pertinent part:

> That as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude the impairment of the Rainbow Bridge National Monument.

Section 3 of that Act, 70 Stat. 105, 107, 43 U.S.C. 620b, provides in pertinent part:

> It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument.

The Public Works Appropriation Act for fiscal year 1961 provides in pertinent part:

> *Provided,* That no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any national monument.[1]

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[1] The Public Works Appropriation Acts for fiscal years 1962 to 1970 contain identical language. In the Acts for fiscal years

STATEMENT

Petitioners brought this action against the Secretary of the Interior and the Commissioner of the Bureau of Reclamation to require them to remove Lake Powell waters from Bridge Creek in the Rainbow Bridge National Monument and to enjoin them from permitting Lake Powell waters to enter the monument boundaries in the future. Various Colorado River water users, including the States of Colorado and Utah, entered the litigation as defendants-intervenors. The facts may be summarized as follows:[2]

Rainbow Bridge National Monument was established by presidential proclamation in 1910 (36 Stat. 2703). It consists of a 160-acre tract of land surrounding Rainbow Bridge, a spectacular natural bridge which spans Bridge Creek, an intermittent stream connected to the Colorado River system. The

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1971 to 1973 the word "appropriated" is changed to "approved" but the proviso is otherwise identical.

The citations to the various appropriation Acts are as follows:

Pub. L. 86-700, 74 Stat. 743, at 747
Pub. L. 87-330, 75 Stat. 722, at 726
Pub. L. 87-880, 76 Stat. 1216, at 1221
Pub. L. 88-257, 77 Stat. 844, at 849
Pub. L. 88-511, 78 Stat. 682, at 687
Pub. L. 89-299, 79 Stat. 1096, at 1102
Pub. L. 89-689, 80 Stat. 1002, at 1008
Pub. L. 90-147, 81 Stat. 471, at 476
Pub. L. 90-479, 82 Stat. 705, at 710
Pub. L. 91-144, 83 Stat. 323, at 330
Pub. L. 91-439, 84 Stat. 890, at 896
Pub. L. 92-134, 85 Stat. 365, at 369
Pub. L. 92-405, 86 Stat. 621, at 625

[2] The case was decided on motions for summary judgment. The facts are largely undisputed and are set out in considerable detail in the opinions of the district court and court of appeals. See, also, *Arizona* v. *California*, 373 U.S. 546, 551-564.

Monument (*i.e.*, the entire 160-acre tract) and its relation to the waters of Lake Powell, the reservoir created by the Glen Canyon Dam, are the subject matter of this lawsuit.[3]

In the absence of the construction of protective works, reservoir waters enter the monument grounds (within the gorge of Bridge Creek) when the water level of the reservoir reaches 3,606 feet above mean sea level. The waters ascend Bridge Creek to Rainbow Bridge when the reservoir reaches 3,645 feet. When Lake Powell is filled to its maximum storage capacity of 3,700 feet, as is contemplated in the normal operation of the project, the waters in Bridge Creek Gorge below Rainbow Bridge will be 48 feet deep. However, reservoir waters within the monument—even at the maximum storage capacity—would be limited to the Bridge Creek gorge and would be substantially below the base of the bridge.

The Glen Canyon Unit of the Colorado River Project was authorized by the Colorado River Storage Project Act of 1956 (the Storage Act), 70 Stat. 105, 43 U.S.C. 620 *et seq.*, and is operated by the Bureau of Reclamation of the Department of the Interior. When the Storage Act was under consideration, Congress recognized that the waters impounded by the proposed dam and reservoir would enter part of the Rainbow Bridge National Monument grounds unless protective works were constructed. To prevent such

[3] We have attached as an appendix hereto a map dated June 1967 of the Glen Canyon Unit, prepared by the Department of the Interior, showing Lake Powell and Rainbow Bridge National Monument.

encroachment and to assure that the Act would not result in damage to national parks or monuments, Section 1 of the Act required the Secretary to "take adequate protective measures to preclude the impairment of the Rainbow Bridge National Monument," and Section 3 stated that it is the "intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument" (*supra*, p. 2).

A few years after passage of the Act, the Bureau of Reclamation requested an appropriation of $3.5 million to construct protective works for Rainbow Bridge National Monument. Hearings before the House Subcommittee of the Committee on Appropriations, Public Works Appropriations for 1961, 86th Cong., 2d Sess., Pt. 2, p. 512. The Committee, over the objection of various conservationists, recommended denial of the request. It found that access to the National Monument would not be affected by the encroachment of the water, that the protective works would be complicated and expensive, and that the geological report on the problem indicated that no structural damage to Rainbow Bridge would result from allowing reservoir waters to accumulate beneath it. H. Rep. No. 1634, 86th Cong., 2d Sess., p. 31. The Senate Appropriations Committee came to the same conclusion. S. Rep. No. 1768, 86th Cong., 2d Sess., p. 38. Thereafter, in every Public Works Appropriation Act concerning the Glen Canyon Unit, Congress inserted a provision expressly prohibiting expenditure of funds for construction or operation of facilities to

prevent waters of Lake Powell from entering any national monument (see N. 1, pp. 2–3, *supra*).[4] At the same time, Congress continued to appropriate funds to construct the Glen Canyon Unit in accordance with its original plans calling for a maximum water level of 3,700 feet (*ibid;* see also Pet. App. B, LXIV–LXVI).

The petitioners do not contend that despite these subsequent actions by Congress the Secretary must build the protective works envisaged in Section 1 of the Storage Act; instead they contend that notwithstanding these subsequent Acts of Congress, Section 3 of the Storage Act requires the Secretary of the Interior to maintain the entirety of Lake Powell at a level 94 feet below its planned level so as to prevent any portion of the reservoir from being within the monument grounds.[5] The Secretary, to the contrary, has taken the position that he has been authorized and directed by Congress to utilize Lake Powell to its full capacity, despite the consequent accumulation of waters in the monument grounds.

The district court's decision, granting the petitioners' motion for summary judgment (Pet. App. A), was reversed by the court of appeals *en banc* (Pet.

[4] Rainbow Bridge National Monument is the only national monument or park affected by this provision. Section 3 of the Act, however, applied not only to Rainbow Bridge National Monument but served, and continues to serve, to prevent the construction of the once proposed Echo Park Dam in Dinosaur National Monument. See Pet. App. A, XXVIII–XXX. Congress may be unwilling to repeal Section 3 (see Pet. 17; Pet. App. C, LXXXVIII) for that reason.

[5] Such an interpretation would result in the operation of the entire Glen Canyon Unit (see attached map) at approximately one-half of its planned storage capacity.

App. B). The court of appeals ruled that Section 3 of the Storage Act, insofar as it was applicable to Rainbow Bridge National Monument, was repealed by the subsequent appropriation Acts and other statutes which indicated congressional intention that Lake Powell be utilized at constructed capacity. The court, however, directed the district court to retain jurisdiction of the case for ten years to insure that the high water level of Lake Powell will not exceed a depth of 55 feet (3700 feet above mean sea level) in the creek gorge below Rainbow Bridge.[6]

ARGUMENT

1. Petitioners contend (Pet. 11–17) that the decision of the court of appeals is contrary to various decisions of this Court holding that repeals by implication are not favored. However, as the court of appeals demonstrated in its opinion, on which we rely (Pet. App. B, LXVI–LXVII), here Congress, after a public hearing, specifically expressed its intent that reservoir waters be allowed to enter the monument grounds. The congressional reports accompanying the appropriation Acts show in unambiguous language that Congress intended to permit the waters of Lake Powell to enter Bridge Creek gorge to the extent required by the planned level of the reservoir.

[6] One judge who concurred in the majority opinion dissented only from that part of the order which directed the district court to retain jurisdiction. Two judges dissented on the ground that Congress had not repealed Section 3 of the Act by refusing to fund Section 1 and that Congress, and not the court, must repeal Section 3 if it wishes to change the balancing of interests it made at the time the Act was passed (Pet. App. B, LXXIII–LXXX).

As the court of appeals observed (Pet. App. B, LXVII), "The committee reports indicate it was concluded there would [be] no physical damage to the Rainbow Bridge itself. This 'repeal,' if it should be called that, thus was straight forward, direct, and after hearings on the subject." "The record," the court concluded, "shows that Congress evaluated the issues and reached a decision" (Pet. App. B, LXVIII, LXI–LXVI).[7]

2. There is no indication that the result reached below creates any threat to the physical integrity of Rainbow Bridge or impairs the use of the monument grounds. Moreover, the court of appeals has ordered the district court to retain jurisdiction to see that the water levels allowed by the decision are not exceeded. The decision of the court of appeals is based solely on the unique factual circumstances, legislative history and statutes relating to Rainbow Bridge National Monument and the Glen Canyon Unit. No other national monument or park is affected. The decision does not create a conflict between the circuits and does not present a legal question of general importance warranting review by this Court.

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[7] It is well established that Congress, by enactment of an appropriation Act, may suspend or repeal previous legislation. *United States* v. *Dickerson*, 310 U.S. 554, 555; *National Labor Relations Board* v. *Thompson Products*, 141 F. 2d 794, 797 (C.A. 9); *Tayloe* v. *Kjuer*, 171 F. 2d 343, 344 (C.A. D.C.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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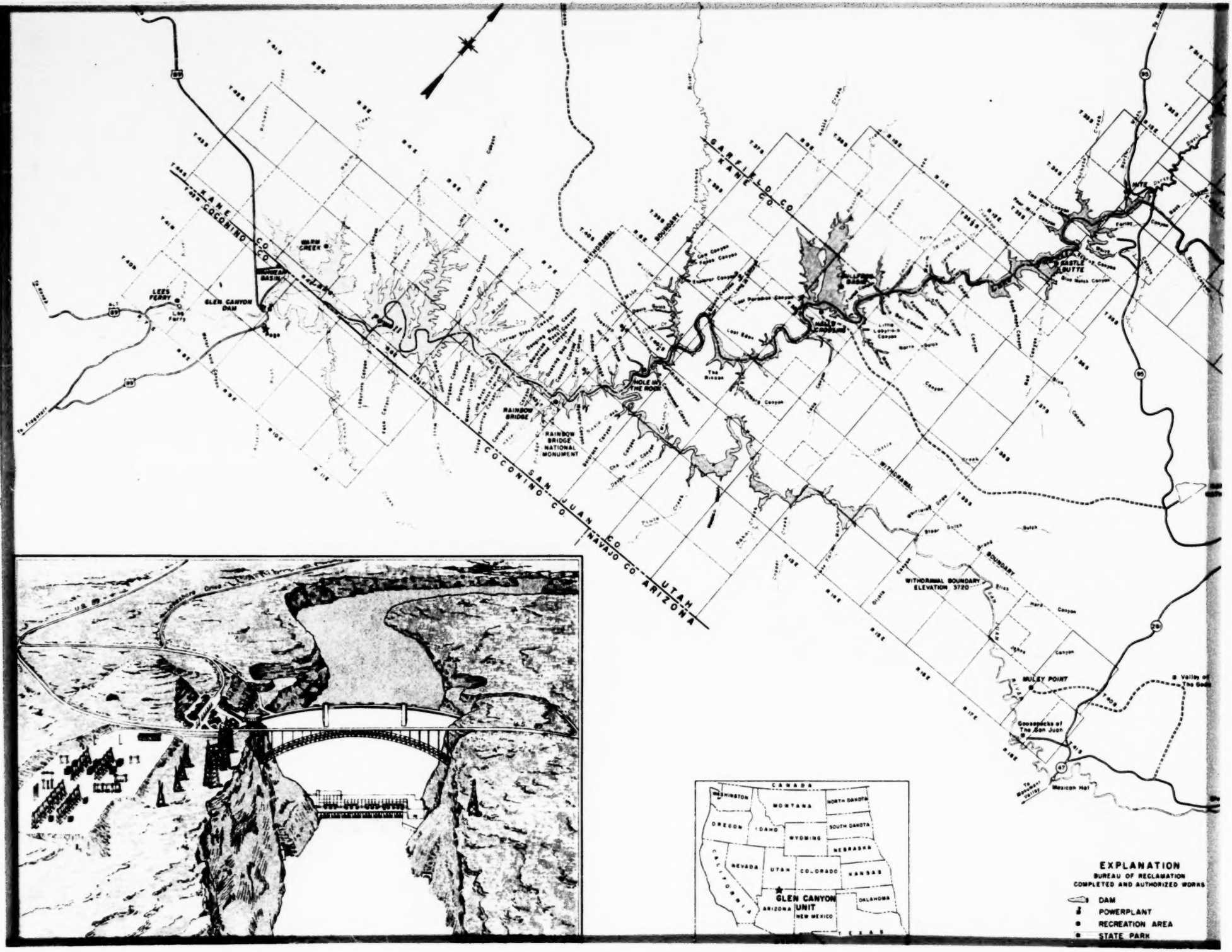
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MARK CREEK
RAINBOW BRIDGE
RAINBOW BRIDGE NATIONAL MONUMENT
HOLE IN THE ROCK
CASTLE BUTTE
WITHDRAWAL BOUNDARY ELEVATION 5720'
MULEY POINT
Goosenecks of The San Juan
Valley of The Gods
Mexican Hat
CANADA
WASHINGTON
MONTANA
NORTH DAKOTA
OREGON
IDAHO
WYOMING
SOUTH DAKOTA
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COMPLETED AND AUTHORIZED WORKS
DAM
POWERPLANT
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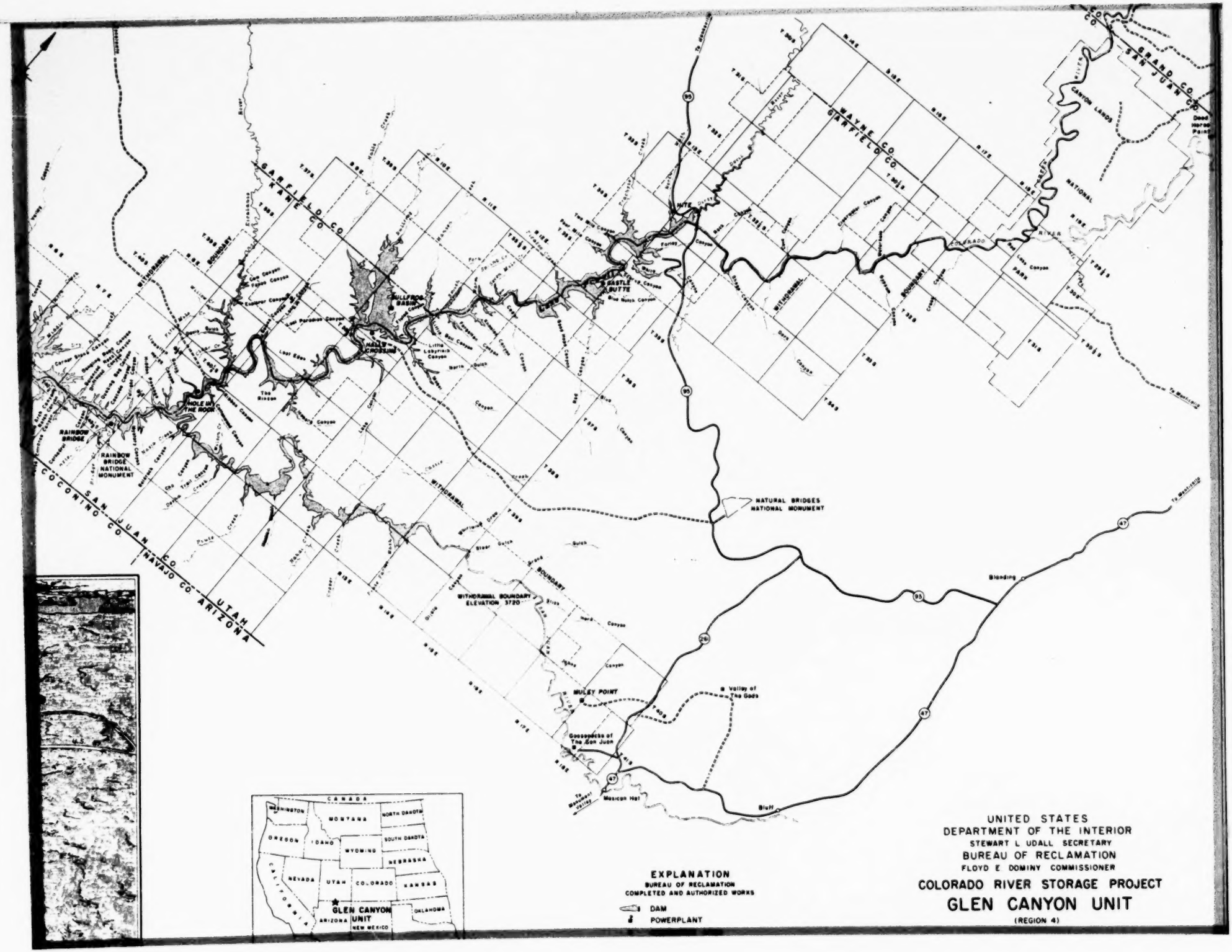
STATE PARK



EXPLANATION

BUREAU OF RECLAMATION COMPLETED AND AUTHORIZED WORKS

DAM

POWERPLANT

UNITED STATES
DEPARTMENT OF THE INTERIOR
STEWART L UDALL SECRETARY
BUREAU OF RECLAMATION
FLOYD E DOMINY COMMISSIONER

COLORADO RIVER STORAGE PROJECT
GLEN CANYON UNIT

(REGION 4)